

September 19, 2007

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
NUCLEAR FUEL SERVICES, INC)	Docket No. 70-143-CO
)	
Special Nuclear Materials Facility)	ASLBP No. 07-857-01-CO-BD01
(Confirmatory Order))	

NRC STAFF'S RESPONSE TO HEARING REQUEST OF BARBARA A. O'NEAL

INTRODUCTION

On February 20, 2007, the Nuclear Regulatory Commission (NRC) Staff issued a Confirmatory Order to Nuclear Fuel Services, Inc., an NRC licensee.¹ The Confirmatory Order was the result of an agreement reached during alternative dispute resolution (ADR) between the Staff and the Licensee to resolve apparent violations at the Licensee's facility in Erwin, Tennessee. Part VI of the Confirmatory Order states: "Any person adversely affected by this Confirmatory Order, other than the Licensee, may request a hearing within 20 days of its issuance." Although the Confirmatory Order was originally designated Official Use Only, the Staff later determined that the Order could be released publicly and published notice of the Order in the Federal Register. The Federal Register Notice, published July 30, 2007, states, "Requests for hearing from anyone other than the Licensee must be filed within 20 days of the date of publication of this Notice in accordance with Section VI of the Confirmatory Order."

¹ Nuclear Fuel Services, Inc.; Notice of Publication of Confirmatory Order and Opportunity for Hearing, 72 Fed. Reg. 41,528 (July 30, 2007) ("Confirmatory Order" or "Order").

On August 27, 2007, Barbara A. O'Neal (Petitioner) filed a hearing request.² The Board should deny this hearing request because it is untimely. Moreover, as the Staff will explain, the Petitioner fails to demonstrate that she will be adversely affected by the Confirmatory Order and, for that reason, is unable to establish that she has either standing to participate in a hearing or is able to proffer an admissible contention.

BACKGROUND

The Licensee is the holder of Special Nuclear Materials License No. SNM-124, issued by the NRC on July 2, 1999, pursuant to 10 C.F.R. Part 70. The license authorizes the possession and use of nuclear materials associated with operation of the Licensee's facility, in accordance with the conditions specified therein. The facility is located on the Licensee's site in Erwin, Tennessee.

NRC inspections at the Licensee's facility identified a number of apparent violations during the years 2005 and 2006. These violations involved failure to comply with numerous NRC requirements, including requirements pertaining to the use of personal protective equipment, the transfer and security of radiological materials, and physical security at the Licensee's facility. Based on these apparent violations, the Staff considered escalated enforcement actions against the Licensee. Subsequently, the Licensee accepted the option of entering into alternative dispute resolution (ADR). As the result of ADR sessions conducted on September 28 and November 30, 2006, the Staff and the Licensee agreed to a Confirmatory Order addressing the apparent violations.

² "Request for Hearing Submitted by Barbara A. O'Neal," August 27, 2007. (ADAMS ML072410368) (Petition).

Pursuant to the Confirmatory Order, the Licensee agreed to conduct, via a third party, independent safety culture assessments within the parameters described in Section V of the Order. The Licensee also agreed that within 60 days of the date of the Order it would submit for NRC approval a request to amend its license to revise its configuration management (CM) program. The amendment request would include a plan and schedule for implementation of the revised CM program. As part of the agreement reached in ADR, the Staff agreed that enforcement discretion is warranted for the apparent violations listed in Section II.A through F of the Confirmatory Order and that the apparent violations would not be cited.³

LEGAL STANDARD

An individual who requests a hearing before the Commission must demonstrate that he or she has standing to do so. 10 C.F.R. § 2.309(a). The individual must also set forth at least one admissible contention. *Id.* Where an enforcement order is at issue, as in the present case, “the threshold question—related to both standing and admissibility of contentions—is whether the hearing request is within the scope of the proceeding as outlined in the order.” *State of Alaska Department of Transportation and Public Facilities* (Confirmatory Order Modifying License) CLI-04-26, 60 NRC 399, 405 (2004) (“ADOT”), citing *FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), CLI-04-23, 60 NRC 154, 157 (2004). The Commission has the authority to define the scope of the hearing, and this authority includes limiting the hearing to the question of whether the order should be sustained. *Bellotti v. N.R.C.*, 725 F. 2d 1380, 1381 (D.C. Cir., 1983), *affg Boston Edison Co.* (Pilgrim Nuclear Power Station), CLI-82-16, 16 NRC 44 (1982). See also ADOT, CLI-04-26, 60 NRC at 405; *FirstEnergy*

³ Nuclear Fuel Services, Inc.; Notice of Publication of Confirmatory Order and Opportunity for Hearing, 72 Fed. Reg. at 41,529.

Nuclear Operating Company (Davis-Besse Nuclear Power Station, Unit 1), CLI-04-23, 60 NRC 154, 157–58 (2004); *Maine Yankee Atomic Power Co.* (Maine Yankee Atomic Power Station), CLI-04-5, 59 NRC 52, 56 (2004).

In order to intervene in an enforcement proceeding, an individual must show that he or she has standing to intervene, which requires a showing of an “injury in fact’ that is . . . ‘fairly traceable to the challenged action’ and . . . is likely to be ‘redressed by a favorable decision.’” *Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site Decontamination and Decommissioning Funding), CLI-94-12, 40 NRC 64, 71-72 (1994). An individual cannot establish standing by arguing that the Staff should impose a stricter penalty on the licensee, because “allowing NRC hearings on claims for stronger enforcement remedies risks ‘turning focused regulatory proceedings into amorphous public extravaganzas.’” *ADOT*, CLI-04-26, 60 NRC at 404, *citing Bellotti*, 725 F. 2d at 1382. Further, an individual may not request a hearing in order to impose a stricter penalty on the licensee, because the individual is not injured by the lesser penalty in the Staff’s order. *See, id.* at 405.

The mere fact that the Staff’s order does not improve the individual’s personal position does not establish standing. *ADOT*, CLI-04-26, 60 NRC at 406. To decide whether an individual’s hearing request should be granted, the relevant points of comparison are the individual’s positions with and without the Staff’s order—the question is not whether the individual’s position would be improved by some hypothetical substitute order. *Id.* An individual “simply is not adversely affected by a Confirmatory Order that improves the safety situation over what it was in the absence of the order.” *Id.* In essence, requests for relief going beyond the actions in an enforcement order are requests for relief that are outside the scope of the proceeding.

Because an individual must show he or she would be adversely affected by the Staff's enforcement order, it should not be expected that individuals will routinely be made parties to hearings on such orders:

In practicality it is unlikely that petitioners will often obtain hearings on confirmatory enforcement orders. That's because such orders presumably enhance rather than diminish public safety. Nevertheless, the notice of opportunity for hearing provides the public a "safety valve" because an order conceivably may remove a restriction upon a licensee or otherwise have the effect of worsening the safety situation.

ADOT, CLI-04-26, 60 NRC at 406 n.28. This opportunity to obtain a hearing, while carefully circumscribed, is consistent with the rationale underlying *Bellotti* : "when a licensee agrees to make positive changes or does not contest an order requiring remedial changes, it should not be at risk of being subjected to a wide-ranging hearing and further investigation." *Id.* at 405.

Accordingly, in the present case the only matters at issue are the measures listed in the Confirmatory Order, and the Petitioner must show that she would be adversely affected by those measures. To the extent the Petitioner seeks additional measures as a substitute for those imposed by the Staff, the Board should reject her request for hearing under the *Bellotti* doctrine.

DISCUSSION

The Petitioner's hearing request should be denied because it is untimely and because she neither demonstrates that she has standing to intervene in this proceeding nor proffers an admissible contention.

The Notice of Opportunity for Hearing was published on July 30, 2007. As stated in the Notice of Opportunity for Hearing, requests for hearing were due within 20 days of the date of

issuance of the hearing notice, in this case by Monday, August 20, 2007.⁴ Nuclear Fuel Services, Inc.; Notice of Publication of Confirmatory Order and Opportunity for Hearing, 72 Fed. Reg. at 41,530-31. Any request for an extension of time must have been made in writing to the Director, Office of Enforcement, and must have “include[d] a statement of good cause for the extension.” *Id.* at 41,530. Here, the Petitioner’s hearing request was not filed until August 27, 2007, seven days late, and the Petitioner never requested an extension of time in which to file her request. Therefore, her Hearing Request is untimely and should be dismissed.⁵

Additionally, the Petitioner has not demonstrated standing nor put forth an admissible contention. In her hearing request Petitioner identifies a number of general areas of concern. Petitioner requests that the NRC hold a hearing to explain the decision to not release documents related to NFS. She believes that these restrictions prevented the CDC [Centers for Disease Control and Prevention] from doing a “thorough job of checking our water and air for their 2006 public health assessment.” Petitioner argues that the lack of information on the NFS facility denied her access to “information on which to make a decision about my health and safety.” She also states that the NRC “should tell me, with particularity, how I was or could have been harmed by this March 6, 2006 spill or any other violations, and how it is going to insure my safety in the future.” Further, Petitioner states that she does not believe “that NFS has adequate protection from attack,” noting that helicopter and shoulder mounted missile attacks are not well defended against. Petitioner also argues that “there really is no plan for public safety or

⁴ Because the 20th day following the issuance of the Notice of Opportunity fell on Sunday, August 19, 2007, hearing requests were not due until Monday, August 20, 2007. See, 10 C.F.R. § 2.306.

⁵ Petitioner alleges that she was informed by a “NRC Ref Librarian” that the time to file was “20 working days,” which would have pushed the filing deadline to August 27. However, Petitioner did not request an extension once she learned that the requirement was 20 calendar days, as was done by other petitioners. See August 22, 2007, Commission Extension Order (ML072340685). Since Petitioner did not request and was not granted an extension of time the Staff considers her hearing request to be untimely.

evacuation in case of an accident or emergency involving NFS . . . and none of the local officials were informed about the March 6, 2006 spill.”

Although she does not specifically address the question of standing, Petitioner seems to argue that she should be granted standing because she lives “less than one-half mile from the Nuclear Fuel Services plant in Erwin, TN.” The Petitioner’s geographic proximity to the Licensee’s facility and her alleged injury from the Licensee’s activities are not sufficient to establish standing in this type of proceeding.⁶ In an enforcement proceeding, “without any injury attributable to the Confirmatory Order,” a petitioner cannot have standing. *ADOT*, CLI-04-26, 60 NRC at 406, *citing Maine Yankee*, CLI-04-05, 59 NRC at 57 n.16. In this case, the contemplated actions listed in Part V of the Confirmatory Order are a number of steps the Licensee will take to improve its safety culture. The Petitioner fails to show, nor does she even allege, that the contemplated actions—changes to improve the licensee’s safety culture—will cause her injury. The Petitioner therefore cannot establish that she has either standing or any contention that would be admissible at a hearing, and her hearing request should be denied.

The Petitioner also fails to establish the right to a hearing because each of her concerns is outside the scope of this proceeding. The Petitioner does not argue that the Confirmatory Order is in any way flawed, but only raises issues that are outside of the scope of the Order:

⁶ In licensing actions involving applicants and licensees other than reactors, the Commission has typically applied a “proximity-plus” theory of standing, under which “a presumption of standing based on geographical proximity may be applied . . . where there is a determination that the proposed action involves a significant source of radioactivity producing an obvious potential for offsite consequences.” *Sequoyah Fuels*, CLI-94-12, 40 NRC at 75 n.22. However, where the proposed action is an enforcement order, the petitioner must show that the order causes offsite consequences in the sense that it adversely affects her. *ADOT*, CLI-04-26, 60 NRC at 405. Here, the proposed action is the Confirmatory Order issued to the Licensee. The Petitioner does not explicitly or implicitly allege that the Confirmatory Order will cause any offsite consequences, nor any adverse consequences to her personally. Thus, despite the Petitioner’s proximity to the Licensee’s site, she would be unable to establish standing even under a “proximity-plus” theory.

“The only issue in an NRC enforcement proceeding is whether the order should be sustained.” *ADOT*, CLI-04-26, 60 NRC at 404. All of Petitioner’s contentions—the NRC’s decision to classify NFS documents as Official Use Only, inadequate protection from attacks at the NFS facility, inadequate emergency planning, and harm that was or could have occurred to Petitioner as a result of the March 6, 2006 spill—are outside the scope of this proceeding.

The Petitioner suggests additional safety measures that she wants NFS to implement and raises concerns beyond those addressed in the Order. However, as the *Bellotti* court noted, a petitioner who “wishes to litigate the need for still more safety measures, perhaps including the closing of the facility, will be remitted to section 2.206’s petition procedures.” *Bellotti*, 725 F.2d at 1383. A number of Petitioner’s concerns could be properly brought to the NRC’s attention through the 2.206 petition process; an intervention petition in response to the Confirmatory Order is not the correct vehicle to raise these concerns.⁷

⁷ Information on the Section 2.206 petition process and instructions for submitting a 2.206 petition can be found at: <http://www.nrc.gov/about-nrc/regulatory/enforcement/petition.html>.

CONCLUSION

The Petitioner fails to explain how she would be adversely affected by the Confirmatory Order. The Petitioner seeks to impose on the Licensee measures beyond those described in the Confirmatory Order, but whether or not such measures should be imposed is outside the scope of this proceeding. Therefore, the Board should deny the Petitioner's request for hearing.

Respectfully submitted,

/RA by Tison A. Campbell/

Tison A. Campbell
Counsel for the NRC Staff

Dated at Rockville, Maryland
this 19th day of September, 2007

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO HEARING REQUEST OF BARBARA A. O'NEAL." in the above captioned proceeding have been served on the following persons by deposit in the United States Mail; through deposit in the Nuclear Regulatory Commission internal mail system as indicated by an asterisk(*); and by electronic mail as indicated by a double asterisk (**) on this 19th day of September, 2007.

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